

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

In re:) 1996 OAL Determination No. 2
Request for Regulatory)
Determination filed by the) [Docket No. 90-033]
MICHELLE JAN NG regarding)
The BOARD OF) December 11, 1996
REGISTRATION FOR)
PROFESSIONAL ENGINEERS) Determination Pursuant to
AND LAND SURVEYOR'S) Government Code Section 11340.5;
policies 1) requiring) Title 1, California Code of
applicants to concurrently) Regulations, Chapter 1, Article 3
pass portions of the 1988)
Special Civil Engineers)
Examination and 2) not)
retroactively applying the)
post-1988 partial pass rule)
for the same examination¹)

ENDORSED FILED
IN THE OFFICE OF
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SECRETARY OF STATE

Determination by: JOHN D. SMITH, Director

HERBERT F. BOLZ, Supervising Attorney
GORDON R. YOUNG, Staff Counsel
Regulatory Determinations Program

SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not certain Board of Registration for Professional Engineers and Land Surveyor's licensing examination policies are "regulations" and therefore without legal effect unless adopted in compliance with the Administrative procedure Act.

The Office of Administrative Law concludes that both policies are "regulations" required to be adopted pursuant to the Administrative Procedure Act.

THE ISSUE PRESENTED²

The Office of Administrative Law has been requested to determine whether the³ Board of Registration for Professional Engineers and Land Surveyors' ("Board") policies set forth below are "regulations" as defined in Government Code section 11342, subdivision (g), that should have been, but were not adopted in accordance with the Administrative Procedure Act ("APA"):⁴

- 1) Policy requiring applicants to pass portions of the 1988 Special Civil Engineers Examination concurrently;
- 2) Policy allowing post-1988 applicants to partially pass portions of the Special Civil Engineers Examination but not to apply the policy change retroactively to prior applicants.

THE DECISION^{5, 6, 7, 8}

The Office of Administrative Law finds that:

- (1) The Board's quasi-legislative enactments are generally required to be adopted pursuant to the rulemaking requirements of the APA;
- (2) The challenged policies are "regulations" as defined in the key provision of Government Code section 11342, subdivision (g);
- (3) No exceptions to the APA requirements apply to the challenged policies found to be "regulations."
- (4) Both policies violate subdivision (a) of Government Code section 11340.5.⁹

REASONS FOR DECISION

I. THE APA AND REGULATORY DETERMINATIONS BY OAL

In *Grier v. Kizer*, the California Court of Appeal described the APA and OAL's role in its enforcement as follows:

"The APA was enacted to establish *basic minimum procedural requirements* for the adoption, amendment or repeal of *administrative regulations promulgated by the State's many administrative agencies*. (Stats. 1947, ch. 1425, secs. 1, 11, pp. 2985, 2988; former Gov. Code section 11420, see now sec. 11346.) . . . The APA requires an agency, inter alia, to give notice of the proposed adoption, amendment, or repeal of a regulation (section 11346.4), to issue a statement of the specific purpose of the proposed action (section 11346.7), and to afford interested persons the opportunity to present comments on the proposed action (section 11346.8). Unless the agency promulgates a regulation in substantial compliance with the APA, the regulation is *without legal effect*. (*Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 583 P.2d 744).

In 1979, the Legislature established the OAL and charged it with the orderly review of administrative regulations. In so doing, the Legislature cited an unprecedented growth in the number of administrative regulations being adopted by state agencies as well as the lack of a central office with the power and duty to review regulations to ensure they are written in a comprehensible manner, are authorized by statute and are consistent with other law. (Sections 11340, 11340.1, 11340.2)." [Footnote omitted; emphasis added.]¹⁰

In 1982, recognizing that state agencies were for various reasons bypassing OAL review (and other APA requirements), the Legislature enacted Government Code section 11340.5. That section, in broad terms, prohibits state agencies from issuing, utilizing, enforcing or attempting to enforce agency rules which should have been, but were not, adopted

pursuant to the APA. The section also provides OAL with the authority to issue a regulatory determination as to whether a challenged state agency rule is a "regulation" as defined in the APA.¹¹

If a state agency rule is a "regulation" but not properly adopted in accordance with the APA, the agency rule is invalid.

II. THE RULEMAKING AGENCY NAMED IN THIS PROCEEDING: THIS REQUEST FOR DETERMINATION

The Rulemaking Agency Named in this Proceeding: The Board of Registration for Professional Engineers and Land Surveyors

In 1929, the Legislature created the State Board of Registration for Civil Engineers.¹² Through the next several decades, the Legislature renamed the Board and expanded the scope of the original Board's powers to oversee not only civil engineers but other professional engineers as well. In 1983, the Board was given its current name.¹³ As provided in the Professional Engineers Act,¹⁴ the Board is responsible for the registration, certification, and oversight of professional engineers and land surveyors in California.

The Board of Registration for Professional Engineers and Land Surveyors ("Board") is under the jurisdiction of the Department of Consumer Affairs.¹⁵

Land surveyors are governed by the "Professional Land Surveyors' Act," which is found in Business and Professions Code sections 8700 through 8806.

The Board's regulations are set out in Title 16, California Code of Regulations ("CCR"), Chapter 5, sections 400 through 471.

Rulemaking Authority¹⁶

The Board has been granted general rulemaking authority by Business and Professions Code section 6716, which states in part:

"The board may adopt rules and regulations consistent with

law and necessary to govern its action. *These rules and regulations shall be adopted in accordance with the provisions of the Administrative Procedure Act.*" [Emphasis added.]

Business and Professions Code section 6754 grants the Board specific authority to adopt regulations governing examination for registration as an engineer. Section 6754 provides:

"Examination for registration shall be held at such times and places as the board shall determine.

The second division of the examination for all branches specified in Section 6732 shall be administered at least once each year.

Work of the board relating to examination and registration may be divided into committees as the board shall direct. *The scope of examinations and the methods of procedure may be prescribed by board rule.*" [Emphasis added.]

This Request for Determination

This Request for Determination was submitted to OAL by Michelle Jan Ng on July 13, 1990.

On June 18, 1993, OAL published a summary of this Request for Determination in the California Regulatory Notice Register,¹⁷ along with a notice inviting public comment. No public comments were received during the 30-day written public comment period. The Board submitted its Response to the Request for Determination ("Response") on August 2, 1993. The Board's argument that the challenged policies do not constitute regulations is as follows:

"The answer to the first part of the inquiry [as to whether the challenged policies are "regulations"] in the instant case is 'yes.' There is no dispute that the administration of the Special Civil Engineers Examination are applied generally to all applicants for registration as civil engineers. However, the answer to the second part of the inquiry is 'no.' The board's administration of the test does not implement,

interpret or make specific the law. There is sufficient statutory authorization¹⁸ for the board to administer the examination according under its existing regulations. Requiring applicants for registration as a civil engineer to pass portions of the 1988 Special Civil Engineers Examination concurrently is within the scope of the board's discretion. The board's subsequent policy of allowing post-1988 applicants to partially pass portions of the Special Civil Engineers Examination but not to apply the policy change retroactively to prior applicants is also within the board's administrative discretion.

Business and Professions Code section 6754 provides authority for the board to administer examinations as follows:

'Examination for registration shall be held at such times and places as the board shall determine.

The second division of the examination for all branches specified in Section 6732 shall be administered at least once each year.

Work of the board relating to examination and registration may be divided into committees as the board shall direct. The scope of examinations and the methods of procedure may be prescribed by board rule.' (Emphasis added.)

In relevant part, Business and Professions Code section 6716 provides additional specific authority for the board to promulgate regulations:

'The board may adopt rules and regulations consistent with law and necessary to govern its action. These rules and regulations shall be adopted in accordance with the provisions of the Administrative Procedure Act. ...'

Under the authority of Business and Professions Code sections 6716 and 6754, the board has promulgated 16 California Code of Regulations section 436 as follows:

'(a) Written examinations shall be given at intervals as determined by the board but not less than once each year.

(b) The executive secretary shall publish annually, not later than three months prior to the end of each calendar year a schedule of examinations for the following year.

(c) Whenever circumstances warrant such action the board may postpone advance, or otherwise change without notice the examination schedule previously published.' (Emphasis added.)

It is a rule of statutory construction that unless otherwise defined, words in a statute will be interpreted as taking their ordinary, contemporary and common meaning. (Committee of Seven Thousand v. Superior Court (1988) 45 Cal.3d 496, 247 Cal.Rptr. 362.) In relevant part, the term 'schedule' is defined to mean 'a program of forthcoming events or appointments. ... a production plan allotting work to be done and specifying deadlines.' (The American Heritage Dictionary, New College Edition, 1980, p. 1160.) Employing the ordinary, contemporary and common meaning of the statutes and applicable regulation, the board is provided broad authority and discretion to administer the required examinations according to its own determined schedule. The board's discretionary schedule merely requires an applicant to meet a production plan allotting the examination to be completed and specifying deadlines for completion of the examination.

THE CHALLENGED POLICY FALLS WITHIN AN ESTABLISHED EXCEPTION TO THE APA REQUIREMENTS

The board's 1988 and subsequent policies related to the administration of the Special Civil Engineers Examination is a product of the board's internal procedures and management. The board's policy of requiring applicants for registration as a civil engineer to pass portions of the 1988 Special Civil Engineers Examination concurrently is a scheduling policy

and within the board's existing regulatory discretion. Likewise, the board's subsequent policy of allowing post-1988 applicants to partially pass portions of the Special Civil Engineers Examination but not to apply the policy change retroactively to prior applicants is also within the board's administrative discretion. Both policies simply require the examination to be completed according to specified time schedule. The policy of not to apply the post-1988 policy change retroactively to prior applicants is also within the board's administrative discretion and is fair and equitable to all previous applicants who were previously provided notice that they must pass all portions of the examination concurrently. To change the policy retroactively would not be equitable to those applicants who prepared for the 1988 examination with the expectation that they had to complete all portions concurrently. To change the policy retroactively would not be equitable to applicants who prepared for the 1988 examination with the expectation that they had to complete all portions concurrently. *As a consequence, the board's examination policies in this matter only relate to the internal management of scheduling and is exempt from the definition of "regulation" under the APA. (Gov. Code 11342(b).)* [Emphasis added in italics.]

III. ANALYSIS

The analysis portion of this Determination is divided into three parts:

- A. **Is the APA generally applicable to the Board's quasi-legislative enactments?**
- B. **Does either challenged policy identified in the Request for Determination constitute a "regulation" within the meaning of Government Code section 11342?**
- C. **Does either challenged policy found to be a "regulation" fall within any established general exception to APA requirements?**

A.

A. Is APA generally applicable to the Board's quasi-legislative enactments?

Government Code section 11000 states in part:

"As used in this title [Title 2, 'Government of the State of California'] '*state agency*' includes every state office, officer, department, division, bureau, *board*, and commission."
(Emphasis added.)

This statutory definition applies to the APA: i.e., it helps OAL determine whether or not a particular "state agency" is subject to APA rulemaking requirements. Section 11000 is contained in Title 2, Division 3 ("Executive Department"), Part 1 ("State Departments and Agencies"), Chapter 1 ("State Agencies") of the Government Code. The rulemaking portion of the APA is also found in Title 2 of the Government Code; it is Chapter 3.5 of Part 1 of Division 3. The Board of Registration for Professional Engineers and Land Surveyors, a "state . . . board," is clearly a "state agency" as that term is defined in Government Code section 11000.

Furthermore, the APA narrows somewhat the broad reach of the term "state agency" given in Government Code section 11000. Government Code section 11342, subdivision (a), provides that for purposes of the APA the term "state agency" does not include agencies in the "judicial or legislative departments of the state government."¹⁹ The Board is not part of either the judicial or legislative departments of state government, but, rather, is part of the executive branch of government. Accordingly, we conclude that the Board of Registration for Professional Engineers and Land Surveyors is a state agency to which the APA rulemaking requirements generally apply.²⁰

Thus, the APA is generally applicable to the quasi-legislative enactments of the Board of Registration for Professional Engineers and Land Surveyors.

B.

Does either challenged policy identified in the Request for Determination constitute a "regulation" within the meaning of Government Code section 11342?

In part, Government Code section 11342, subdivision (g), defines "regulation" as:

" . . . *every* rule, regulation, order, or standard of general application or the amendment, supplement or revision of *any* such rule, regulation, order or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure," [Emphasis added.]

Government Code section 11340.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"(a) *No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]*" [Emphasis added.]

In *Grier v. Kizer*,²¹ the California Court of Appeal upheld OAL's two-part test as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g), formerly subdivision (b) (See stats. 1994, ch. 1039):

First, is the challenged rule either

- . a rule or standard of general application *or*
- . a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- . implement, interpret, or make specific the law enforced or

administered by the agency or

govern the agency's procedure?²²

If an uncodified rule fails to satisfy either of the above two parts of the test, we must conclude that it is *not* a "regulation" and *not* subject to the APA.

However, the *Grier* court also cautioned that:

" . . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.*" [Emphasis added.]²³

Three subsequent California Court of Appeal cases provide additional guidance on the proper approach to take when assessing claims that agency rules are *not* subject to the APA.

According to *Engelmann v. State Board of Education* (1991), agencies need not adopt as regulations those rules contained in "a statutory scheme which the Legislature has already established. . . ." ²⁴ But "to the extent that any of the [agency rules] depart from, or embellish upon express statutory authorization and language, the [agency] will need to promulgate regulations. . . ." ²⁵ Similarly, agency rules properly promulgated *as regulations* (i.e., California Code of Regulations provisions) cannot legally be "embellished upon" in administrative bulletins.

Union of American Physicians and Dentists v. Kizer (1990)²⁶ held that a terse 24-word definition of "intermediate physician service" in a Medi-Cal regulation could not legally be supplemented by a lengthy seven-paragraph passage in an administrative bulletin that went "far beyond" the text of the duly adopted regulation.²⁷ Statutes may legally be amended only through the legislative process; duly adopted regulations--generally speaking--may legally be amended only through the APA rulemaking process.

The third case, *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission)* ("*SWRCB v. OAL*")

(1993), made clear that reviewing authorities focus on the *content* of the challenged agency rule, not the *label* placed on the rule by the agency:

" . . . the . . . Government Code [is] careful to provide OAL authority over regulatory measures whether or not they are designated 'regulations' by the relevant agency. In other words, *if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it. . . .*" (Emphasis added.)²⁸

Application of the Statutory Test to the Board's Challenged Policies

- (1) Is either challenged policy a standard of general application *or* a modification or supplement to such standards?**

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order,²⁹ for instance, all Medi-Cal patients or all physicians who serve Medi-Cal patients.

Here, both challenged Engineer's Board policies are standards of general application. They apply to all applicants for registration as civil engineers taking the Special civil Engineers Examination during the time periods in question. The Board concedes³⁰ this point in its August 2, 1993 response to the Request of Determination. Thus, both policies are rules of general application and satisfy the first prong of the two-part test.

- (2) Does either challenged policy interpret, implement, or make specific the law enforced or administered by the agency or the law which governs the agency's procedure?**

Both policies clearly implement Business and Professions Code section 6754 which, in part, expressly authorizes the Board to do the following with respect to licensing examinations:

"The scope of the examinations and the methods of procedure may be prescribed by board rule."

The challenged examination policies satisfy both parts of the two-part statutory test; OAL concludes that each challenged policy is a "regulation" as defined in Government Code section 11342, subdivision (g).

C.

Does either challenged policy found to be a "regulation" fall within any established general exception to APA requirements?

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.³¹ However, rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.³²

None of the recognized exceptions apply to either challenged policy. However, as set forth above, the Board argues both policies are exempt under the "internal management" exemption of Government Code section 11342(g) because both policies ". . . only relate to the internal management of scheduling [of Specialized Civil Engineers examinations] . . ." (Emphasis in original.)³³

Government Code section 11342, subdivision (g), expressly exempts rules concerning the "internal management" of *individual* state agencies from APA rulemaking requirements:

"'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret or make specific the law enforced or administered by it, or to govern its procedure, *except one which relates only to the internal management of the state agency.*" (Emphasis added.)

Grier v. Kizer provides a good summary of case law on internal management. After quoting Government Code section 11342, subdivision (g), the *Grier* court states:

"*Armistead v. State Personnel Board* [citation] determined that an agency rule relating to an employee's withdrawal of his resignation did not fall within the internal management exception. The Supreme

Court reasoned the rule was 'designed for use by personnel officers and their colleagues in the various state agencies throughout the state. It interprets and implements [a Board rule]. It concerns termination of employment, a matter of import to all state civil service employees. It is not a rule governing the Board's internal affairs. [Citation.] 'Respondents have confused the internal rules which may govern the department's procedure . . . and *the rules necessary to properly consider the interests of all . . . under the statutes. . . .*' [Fn. omitted.]' . . . [Citation; emphasis added by *Grier* court.]

"*Armistead* cited *Poschman v. Dumke* [citation], which similarly rejected a contention that a regulation related only to internal management. The *Poschman* court held: 'Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community.' . . . [Citation.][³⁴]

"Relying on *Armistead*, and consistent therewith, *Stoneham v. Rushen* [citation] held a Department of Corrections' adoption of a numerical classification system to determine an inmate's proper level of security and place of confinement 'extend[ed] well beyond matters relating solely to the management of the internal affairs of the agency itself[,] and embodied 'a rule of general application significantly affecting the male prison population' in its custody. . . .

"By way of examples, the above mentioned cases disclose that the scope of the internal management exception is narrow indeed. This is underscored by *Armistead's* holding that an agency's personnel policy was a regulation because it affected employee interests. Accordingly, even internal administrative matters do not per se fall within the internal management exception" ³⁵

The challenged policies do not fall within the internal management exception. Applying the *Grier* court's explanation of this narrow exception we note that the policies 1) requiring applicants to concurrently pass portions of the 1988 Special Civil Engineers Examination and 2) not retroactively applying the post-1988 partial pass rule to the same

examination apply to and were used by Board members, staff, and, *most importantly*, examination candidates and institutions preparing candidates for the examination. Both policies implement the Board's statutes. They concern the qualifications required to become registered as a Civil Engineer, a matter of import to examination candidates and the general public given the responsibility and importance of work performed by registered Civil Engineers. The policies clearly do not govern the Board's internal affairs. The policies are rules necessary to consider the interests of all under the statutes as stated in *Armistead*. Therefore, the "internal management" exception to APA rulemaking requirements does not apply to either of the Board's policies.


Having found the challenged policies to be "regulations" and not exempt from the requirements of the APA, we conclude that both of the policies violate Government Code section 11340.5, subdivision (a).

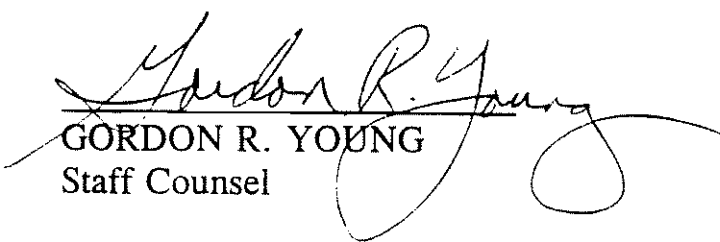
IV. CONCLUSION

For the reasons set forth above, OAL finds that:

- (1) The Board's quasi-legislative enactments are generally required to be adopted as regulations pursuant to the APA;
- (2) The challenged policies are "regulations" as defined in Government Code section 11342, subdivision (g);³⁶
- (3) No exceptions to the APA requirements apply to either policy found to be a "regulation"; and
- (4) Both policies violate Government Code section 11340.5, subdivision (a).

DATE: December 11, 1996


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1. This Request for Determination was filed by Michelle Jan Ng, 1719 Balsam Place, Davis, CA 95616-1601. The Board of Registration for Professional Engineers and Land Surveyors was represented by Gary W. Duke, Staff Counsel, Department of Consumer Affairs, Legal office, 1020 N Street, Sacramento, CA 95814.

To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year. Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

This determination may be cited as "1996 OAL Determination No. 2 (Professional Engineers and Land Surveyors Board)."

2. The legal background of the regulatory determination process--including a survey of governing case law--is discussed at length in note 2 to 1986 **OAL Determination No. 1** (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16, typewritten version, notes pp. 1-4. See also *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 249-250, review denied (APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of state administrative regulations).

In August 1989, a *second* survey of governing case law was published in 1989 **OAL Determination No. 13** (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

In November 1990, a *third* survey of governing case law was published in 1990 **OAL Determination No. 12** (Department of Finance, November 2, 1990, Docket No. 89-019 [printed as "89-020"]), California Regulatory Notice Register 90, No.46-Z, page 1693, note 2. The third survey included (1) five appellate court cases which were decided during 1989 and 1990, and (2) two California Attorney General opinions: one opinion issued before the enactment of Government Code section 11347.5, and the other opinion issued thereafter.

In January 1992, a *fourth* survey of governing case law was published in 1992 **OAL Determination No. 1** (Department of Corrections, January 13, 1992, Docket No. 90-010), California Regulatory Notice Register 92, No. 4-Z, page 83, note 2. This fourth survey included two cases holding that government personnel rules could not be enforced unless duly adopted.

In December 1993, a *fifth* survey of governing law was published in 1993 **OAL**

Determination No. 4 (State Personnel Board and Department of Justice, December 14, 1993, Docket No. 90-020), California Regulatory Notice Register 94, No. 2-Z, page 61, note 3.

In December 1994, a *sixth* survey of governing law was published in **1994 OAL Determination No. 1** (Department of Education, December 22, 1994, Docket No. 90-0210, California Regulatory Notice Register 95, No.3-Z, page 94, note 3.

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

*"'Determination' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which is *invalid and unenforceable* unless*

(1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

(2) it has been exempted by statute from the requirements of the APA."
[Emphasis added.]

See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was *invalid and unenforceable* because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that an uncoded agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b)--now subd. (g)-- yet had not been adopted pursuant to the APA, was "*invalid*").

4. According to Government Code section 11370:

"Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370) and Chapter 5 (commencing with Section 11500) constitute and may be cited as, the Administrative Procedure Act." [Emphasis added.]

We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359. Chapters 4 and 5, also part of the APA, concern the Office of Administrative Hearings and Administrative Adjudication, respectively.

The rulemaking portion of the APA and all OAL regulations are both reprinted and indexed in the annual APA/OAL regulations booklet "**California Rulemaking Law**," which is available from OAL (916-323-6225). The January 1996 revision is \$3.50 (\$6.40 if sent U.S. Mail).

5. *OAL Determinations Entitled to Great Weight In Court*

The California Court of Appeal has held that a statistical extrapolation rule utilized by the Department of Health Services in Medi-Cal audits must be adopted pursuant to the APA. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b) (now subd. (g)), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5 (now 11340.5), OAL issued a determination concluding that the audit rule met the definition of "regulation," and therefore was subject to APA requirements. **1987 OAL Determination No. 10** (Department of Health Services, Docket No. 86-016, August 6, 1987). The *Grier* court concurred with OAL's conclusion, stating that the

"Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b) [now subd. (g)]. [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of **1987 OAL Determination No. 10**, which was submitted to the court for consideration in the case, the court further found:

"While the issue ultimately is one of law for this court, the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is *entitled to great weight*, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, [now 11340.5] subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b) [now subd. (g)], *we accord its determination due consideration.*" [*Id.*; emphasis added.]

The court also ruled that OAL's Determination, that "the audit technique had not been duly adopted as a regulation pursuant to the APA, . . . [and therefore] deemed it to be an invalid and unenforceable 'underground, regulation,' was "*entitled to due deference*." [Emphasis added.]

Other reasons for according "due deference" to OAL determinations are discussed in note 5 of **1990 OAL Determination No. 4** (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384.

6. *Note Concerning Comments and Responses*

In order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response."

If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

7. If an uncodified agency rule is found to violate Government Code section 11340.5, subdivision (a), the rule in question may be validated by formal adoption "as a *regulation*" (Government Code section 11340.5, subd. (b); emphasis added) or by incorporation in a statutory or constitutional provision. See also *California Coastal Commission v. Quanta Investment Corporation* (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.) Of course, an agency rule found to violate the APA could also simply be rescinded.

8. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.

9. Government Code section 11340.5 provides:

"(a) *No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or*

other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

- "(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a [']regulation['] as defined in subdivision (g) of Section 11342.
- "(c) The office shall do all of the following:
- "1. File its determination upon issuance with the Secretary of State.
 - "2. Make its determination known to the agency, the Governor, and the Legislature.
 - "3. Publish its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
 - "4. Make its determination available to the public and the courts.
- "(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.
- "(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:
- "1. The court or administrative agency proceeding involves the party that sought the determination from the office.
 - "2. The proceeding began prior to the party's request for the office's determination.
 - "3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (g) of Section 11342." [Emphasis added.]

10. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 431, 268 Cal.Rptr. 244, 249, review denied.
11. Government Code section 11340.5, subdivision (b).
12. Statutes of 1929, chapter 801, page 1646, section 2.
13. Statutes of 1983, chapter 150, section 4 (Business and Professions Code section 6710.)
14. Business and Professions Code, chapter 7, sections 6700-6799.
15. Business and Professions Code section 6710.
16. *OAL does not review alleged underground regulations for compliance with the APA's six substantive standards*

We discuss the affected agency's rulemaking authority - (see Gov. Code, sec. 11349, subd. (b)) - as a part of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. (Of course, as discussed in the text of the determination, the APA itself applies to all Executive Branch agencies, absent an express statutory *exemption*.) If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL *does not* review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether a challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day

public comment period. (Only persons who have formally requested notice of proposed regulatory actions *from a specific rulemaking agency* will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

17. California Regulatory Notice Register 93, No. 25-Z, June 18, 1993, P. 678-679.

18. The Board's argument that sufficient statutory authority exists for the board to adopt and administer both policies under existing regulations begs the question at issue in this determination. The issue is not whether the Board has rulemaking authority to adopt and administer either policy pursuant to its statutes and existing regulations, but whether either policy meets the definition of "regulation" under the APA. OAL does not dispute the Board's authority to adopt either policy as a regulation pursuant to the APA. The Board, however, failed to adopt either policy as a regulation. The *Grier* court, *supra*, at 268 Cal.Rptr. pp .250-251, considered and rejected an almost identical argument to that made by the Board:

" The Department invokes, inter alia, W & IC section 14170, which states in relevant part: 'Amounts paid for services provided to Medi-Cal beneficiaries shall be audited by the department *in the manner and form prescribed by the department*.' (Italics added.) The Department also cites W & IC section 14133 as authorizing '(c) Postservice postpayment audit, which is review for medical necessity and program coverage after service was rendered and the claim paid. The department may take appropriate steps to recover payments made if subsequent investigation uncovers evidence that the claim should not have been paid.'

It is a fundamental rule of statutory construction that every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect. (*Brown v. Superior Court* (1984) 37 Cal.3d 477, 484, 208 Cal.Rptr. 724, 691 P.2d 272.) **Accordingly, while the above-cited sections and others authorize the Department to audit providers, these sections must be read in conjunction with the balance of the Medi-Cal scheme, specifically, W & IC sections 10725 and 14124.5, which require the Department to comply with the APA in adopting regulations.**

The issue to be determined by this court is whether the challenged audit method constitutes the subject of a regulation within the meaning of section 11342, subdivision (b), of the APA, or amounts only to an exempt internal management rule. If the method were properly the subject of a formal regulation, the Department's failure

to comply with the APA would render the method invalid and unenforceable. (§ 11347.5)" [Emphasis added by bolding.]

The Board's further argument that existing regulation Title 16 California Code of Regulations section 436, subdivision (c), allowing the Board to ". . . change without notice the examination schedule previously published. . . .", permits the Board to adopt and administer either policy without complying with the APA, is likewise without merit. Neither challenged policy involves the Board setting or changing the *date and time* on which the Special Civil Engineers examination was given. Changing the content or nature of the examination itself is clearly not a change in any previously published schedule of when an examination would be given.

19. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also *Auto and Trailer Parks*, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a thorough discussion of the rationale for the "APA applies to all agencies" principle, see **1989 OAL Determination No. 4** (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.

1989 OAL Determination No. 4 was upheld by the California Court of Appeal in *State Water Resources Control Board v. Office of Administrative Law* (Bay Planning Coalition) (1993) 12 Cal.App.4th 697, 16 Cal.Rptr. 2d 25, rehearing denied, Feb. 19, 1993.

20. See *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in the legislative or judicial branch must comply with rulemaking part of the APA when engaged in quasi-legislative activities); *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.
21. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251.
22. The history note to Chapter 5 ("Administrative *Adjudication*," sections 11500 - 11529; emphasis added) of Title 2, Division 3, of the Government Code, contained in West's annotated codes, reveals that Chapter 5 was originally added under the heading "Administrative *Procedure*." (Emphasis added.) Thus, the word "procedure" as used in Government Code section 11342 subdivision (g) would at a minimum appear to encompass the types of rules governing administrative *adjudication* (e.g., administrative hearings on such matters as license revocation) that are found in Chapter 5.

23. *Grier v. Kizer* (1990), 219 Cal.App.3d at p. 438, 268 Cal.Rptr. at p. 253.
24. 3 Cal.Rptr. 2d 47, 63
25. Id.
26. 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891.
27. Id.
28. (1993) 16 Cal. Rptr. 2d 25 at 28.
29. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.
See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324
(standard of general application applies to all members of any open class).
30. Board Response, p. 3.
31. Government Code section 11346.
32. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
 - a. Rules relating *only* to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (g).)
 - b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (g).)
 - c. Rules that "[establish] or [fix] *rates, prices, or tariffs*." (Gov. Code, sec. 11343, subd. (a)(1).)
 - d. Rules directed to a *specifically named* person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
 - e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (g).)

- f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see *Roth v. Department of Veterans Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); *Nadler v. California Veterans Board* (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see *Del Mar Canning Co. v. Payne* (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); see *International Association of Fire Fighters v. City of San Leandro* (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see *Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable). The most complete OAL analysis of the "contract defense" may be found in 1991 OAL Determination No. 6, CRNR, 91, No. 43-Z, p. 1451, 1458, 1461; typewritten version, pp. 175-177. Like *Grier v. Kizer*, 1991 OAL Determination No. 6 rejected the idea that *City of San Joaquin* (cited above in this note) was still good law.

Items a, b, and c, which are drawn from Government Code section 11342, subdivision (g), may also correctly be characterized as "exclusions" from the statutory definition of "regulation"--rather than as APA "exceptions." Whether or not these three statutory provisions are characterized as "exclusions," "exceptions," or "exemptions," it is nonetheless *first* necessary to determine whether or not the challenged agency rule meets the two-pronged "regulation" test: *if* an agency rule is *either* not (1) a "standard of general application" or (2) "adopted . . . to implement, interpret, or make specific the law enforced or administered by [the agency]," *then* there is no need to reach the question of whether the rule has been (a) "excluded" from the definition of "regulation" or (b) "exempted" or "excepted" from APA rulemaking requirements. Also, it is hoped that *separately* addressing the basic two-pronged definition of "regulation" makes for a clearer and more logical analysis and will thus assist interested parties in determining whether or not other uncodified agency rules violate Government Code section 11340.5. In *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied, the Court followed the above two-phase analysis.

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The annual Determinations Index is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Melvin Fong), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814-4602, (916) 323-6225, CALNET 8-473-6225. The price of the latest version of the Index is available upon request. Three indexes are currently available for the following calendar years: (1) 1986-88, (2) 1989-1990, and (3) 1991-1992. Also, regulatory determinations are published in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of \$162.

Though the Determinations Index is not published in the Notice Register, OAL accepts standing orders for Index updates. If a standing order is submitted, OAL will periodically mail out Index updates with an invoice.

33. Board Response, P5.
34. *Armistead* disapproved *Poschman* on other grounds. (*Armistead, supra*, 22 Cal.3d at 204, fn. 2, 149 Cal.Rptr. 1, 583 P.2d 744.)
35. (1990) 219 Cal.App 3d 422 436, 268 Cal Rptr. 244, 252-253.
36. Whether the definition of "regulation" contained in Government Code section 11342, subdivision (g) *should* encompass the level of detail regarding licensing examinations which is embodied in the two challenged policies of the Board is irrelevant to OAL's determination in this matter. The Legislature has seen fit to define "regulation" in this fashion and to require the Board to comply with the APA. OAL has no policy authority to change or interpret the scope of the definition of "regulation" otherwise.

Agencies with similar licensing responsibilities to those of the Board *have* adopted regulations pursuant to the APA which cover issues similar to those covered by the Board's two challenged policies. See, e.g., Board of Dental Examiners, Title 16 CCR section 1041 (examination requirements including the examination sequence for licensure of graduates of foreign dental schools); State Board of Optometry, Title 16 CCR section 1532 (re-examination requirements including partial pass provisions for licensure as an optometrist); Veterinary Medical Board, Title 16 CCR section 2015 (conditional credit and time limitations for partially passing a portion of the national and California state board examination for licensure as a veterinarian).